UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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VICTOR MATUTE,

Plaintiff,

-against-

HYATT CORPORATION,
and FRANK TAYLOR,

Defendants.

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OPINION AND ORDER

98 Civ. 1712 (AGS)

ALLEN G. SCHWARTZ, DISTRICT JUDGE:

Plaintiff Victor Matute ("Plaintiff") commenced this action seeking damages in connection with his employment and subsequent termination by Defendant Hyatt Corporation ("Hyatt"). Plaintiff asserts that he was sexually harassed by his manager at Hyatt, defendant Frank Taylor ("Taylor"), in violation of federal and state law. Defendant moves for summary judgment pursuant to Federal Rule of Civil Procedure 56. For the reasons stated herein, defendants' motion is denied in part and granted in part.

FACTUAL BACKGROUND

Plaintiff was employed by Hyatt as a Room Service Bus Attendant from on or about August 18, 1997 until on or about October 14, 1997. (Defendant's Rule 56.1 Statement ("Defs.' 56.1") ¶ 1.) Defendant Taylor was Manager of Room Service, plaintiff's direct supervisor. (Defs.' 56.1 ¶ 2; Plaintiff's Memorandum of Law ("Pl. Mem.") at 2.) All new bus attendants

such as plaintiff are subject to a 60 working day/90 calendar day probationary period, during which Hyatt is free to terminate the employee if it is not satisfied with his job performance. (Defs.' 56.1 ¶¶ 9, 12.) Plaintiff was terminated by Hyatt during this probationary period. (Defs.' 56.1 ¶¶ 10, 13.)

The parties dispute the reasons that plaintiff was terminated. Defendants assert that plaintiff was fired for poor performance, alleging that numerous complaints were made regarding deficiencies in plaintiff's job performance. (Defs.' 56.1 ¶ 17.) Plaintiff asserts that he was fired at least partly as a result of his negative reaction to sexual overtures made by Taylor. (Pl. Mem. at 10.)

Plaintiff alleges five (5) instances of sexually harassing behavior by Taylor, that (i) on August 19, 1997, Taylor massaged plaintiff's shoulders for approximately ten (10) seconds (Defs.' 56.1 ¶ 52); (ii) Taylor gave plaintiff a two to three seconds shoulder massage on September 2, 1997 (Id. at ¶¶ 53, 54); (iii) on September 7, 1997, Taylor attempted to kiss plaintiff after calling plaintiff into his office (Id. at ¶¶ 55-58); (iv) on September 14, 1997, Taylor beeped plaintiff to come to the room service area, and, as plaintiff arrived, Taylor touched plaintiff's penis while asking him where his beeper was (Id. at ¶ 60); (v) on September 28, 1998, Taylor squeezed plaintiff's nipple after touching a name tag on plaintiff's chest that contained Taylor's name on it (Id. at ¶¶ 61 - 63); after one

incident, plaintiff stated or "joked" that he was going to retain an attorney. (Id. at ¶ 66.) Taylor denies all of these allegations. (Id. at ¶ 64.)

Hyatt maintains a sexual harassment policy that prohibits harassment of employees on the basis of sex and advises employees to report immediately sexually harassing behavior. (Defs.' 56.1 ¶¶ 33, 34.) Plaintiff was given an employee handbook containing this policy. (Defs.' 56.1 ¶¶ 39, 40.) Hyatt, however, was not informed of plaintiff's sexual harassment allegations until after plaintiff was terminated.

After his termination, plaintiff commenced this action seeking damages in connection with his termination and Taylor's harassing behavior. Plaintiff asserts sexual harassment claims pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and a claim for intentional infliction of emotional distress under New York state law.

DISCUSSION

A court must not grant summary judgment unless it is satisfied that "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The burden rests on the moving party to demonstrate the absence of a genuine issue of material fact, and all inferences

and ambiguities are resolved in favor of the party against whom summary judgment is sought. Gallo v. Prudential Residential Servs., Ltd. Partnership, 22 F.3d 1219, 1223 (2d Cir. 1994) (citations omitted). In sexual harassment claims where state of mind and intent of a party are important issues, "a motion for summary judgment must be approached with special caution." Rashid v. Beth Israel Medical Center, 1998 WL 689931, *2 (S.D.N.Y. 1998) (AGS). See also Distasio v.Perkin Elmer Corp., 157 F.3d 55, 61 (2d Cir. 1998). "If there is any evidence in the record from which a reasonable inference could be drawn in favor of the non-moving party on a material issue of fact, summary judgment is improper." Tomka v. The Seiler Corp., 66 F.3d 1295, 1304 (2d Cir. 1995). Drawing all inferences in favor of plaintiff, the parties' submissions present material disputes of fact with regard to plaintiff's sexual harassment claims that cannot be resolved in connection with a motion for summary judgment.

I. PLAINTIFF HAS DEMONSTRATED GENUINE ISSUES OF MATERIAL FACT ON HIS FEDERAL CLAIMS.

Title VII forbids employers from discriminating "against any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of such individual's ... sex . . .." 42 U.S.C. § 2000e-2(a)(1). Two distinct forms of sexual harassment are recognized as violations of Title VII: (1) quid

pro quo sexual harassment, and (2) hostile work environment sexual harassment. See Carrero v. New York City Housing Auth., 890 F.2d 569, 577 (2d Cir. 1989). "Quid pro quo harassment occurs when an employer alters an employee's job conditions or withholds an economic benefit because the employee refuses to submit to sexual demands." Id. (citing Meritor Savings Bank FSB v. Vinson, 477 U.S. 57, 64-65 (1986)). Hostile work environment sexual harassment occurs when an employer's conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." Carrero, 890 F.2d at 577 (quoting Vinson, 477 U.S. at 65 (quoting 29 C.F.R. § 1604.11(a)(3) (1985))). We conclude that plaintiff has established that a genuine issue of material fact exists with respect to both types of sexual harassment claims.[1]

A. Plaintiff's Quid Pro Quo Claim.

A plaintiff attempting to establish a prima facie case of quid pro quo harassment must show that he or she was "subject to unwelcome sexual conduct, and that [his or her] reaction to that conduct was then used as the basis for decisions affecting the

[1] Plaintiff's state causes of action for sexual harassment also survive summary judgment. See also Bradley v. National Railroad Passenger Corporation, 797 F. Supp. 286, 291 (S.D.N.Y. 1992) (standards for asserting federal and New York State sexual harassment causes of action are identical).

compensation, terms, and conditions or privileges of [his or her] employment." Rashid, 1998 WL 689931, *2. In this case, there remain material issues of fact to be determined as to whether plaintiff was terminated in part because of his negative response to Taylor's alleged sexual behavior.

Plaintiff refers to five separate incidents which, if they occurred, can be interpreted as unwelcome sexual conduct on the part of Taylor, defendant's supervisor. Plaintiff was terminated two weeks after the final incident, before his probationary period had expired. Plaintiff alleges that only one other employee had ever been fired prior to the expiration of the probation period. A material issue of fact remains with respect to whether plaintiff's negative responses to this alleged unwelcome conduct was the basis for Taylor's decision to recommend plaintiff's dismissal. Although Defendants assert that Taylor's recommendation was based on a recommendation by his assistant, it remains a triable issue of fact as to whether Taylor would have accepted this recommendation absent plaintiff's negative responses to Taylor's alleged conduct.

B. The Hostile Work Environment Claim.

Title VII's protections are not limited to quid pro quo sexual harassment, but also are intended "to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily

hostile or abusive environment." See Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). Here, plaintiff has raised a triable question of material fact as to whether Taylor's behavior subjected plaintiff to a hostile work environment that he could have avoided had he been a woman.

"[E]ven a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment for purposes of Title VII liability." Tomka, 66 F.3d at 1305. See also Yaba v. Roosevelt, 961 F. Supp. 611, 620 (S.D.N.Y. 1997) (a single incident of sexual touching sufficient to create hostile work environment). Plaintiff here alleges that Taylor touched him on his penis and tried to kiss him.

We simply cannot say here that it would be beyond the realm of reasonableness for a jury to conclude that plaintiff's workplace was "permeated with discriminatory intimidation, ridicule, and insult . . . that was sufficiently severe or pervasive to alter the conditions of [his] employment and create an abusive working environment . . .." See Harris, 510 U.S. at 21 (citing Vinson, 477 U.S. at 65.) The "evaluation of ambiguous acts . . . presents an issue for the jury." Gallagher v. Delaney, 139 F.3d 338, 347 (2d Cir. 1998). As the Second Circuit stated in Gallagher:

> Today, while gender relations in the workplace are rapidly evolving, and views of what is appropriate behavior are diverse and shifting, a jury made up of a

> cross-section of our heterogeneous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment and retaliation.

Id., 139 F.3d at 342.

Nor is defendant entitled to summary judgment on the grounds that it may take advantage of the affirmative defense to hostile work environment claims that was created in Faragher and Burlington. See Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998). In order to be entitled to this defense, Defendants must show that (1) Hyatt used reasonable care in order to correct and prevent sexually harassing behavior, and (2) plaintiff unreasonably failed to make use of opportunities provided by Hyatt to remedy the sexually harassing behavior.

Without addressing the second prong, it is apparent that triable issues remain with respect to the first prong of this test. Plaintiff asserts that previous actions by Taylor put Hyatt on notice regarding Taylor's propensity for sexual harassment. Plaintiff cites one example where Taylor allegedly made sexually suggestive comments to another employee while Taylor was in the shower. (Pl. Mem. at 15.) Hyatt was aware of this incident, where the allegedly harassed employee did not characterize the incident as sexual harassment, but did believe Taylor's comment to be an inappropriate joke. (Defs.' 56.1 ¶ 96.). (Defs.' 56.1 ¶ 94.) Although defendant disputes that

these comments were sexually harassing, the reasonableness of Hyatt's actions in response to this incident are questions for a jury to decide.

II. DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

In order to support a cause of action for intentional infliction of emotional distress under New York law, a plaintiff must show "(1) extreme and outrageous conduct; (2) intent to cause severe emotional distress; (3) a causal connection between the conduct and the injury; and (4) severe emotional distress." Bender v. City of New York, 78 F.3d 787, 790 (2d Cir. 1996). Plaintiff's cause of action must fail because, at the very least, requirement (1) is not met.

New York sets a very high standard for the requirement of "extreme and outrageous conduct." See id. In particular, plaintiff must show behavior that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized [society]." Id. (citing Murphy v. American Home Products Corp., 58 N.Y.2d 293, 303 (1983) (quoting Restatement of Torts, Second, § 46 cmt. d (1965))).

Taylor's conduct does not meet this high standard. While a jury might find it to be harassing and abusive, it is not of the kind that we consider "utterly intolerable in a civilized

society." Sexual harassment complaints rarely meet this standard unless they occur in an unrelenting and continuous fashion, are extraordinarily abusive, and possibly accompanied by physical threats. See, e.g., Persaud v. Axelrod, 1996 WL 11197 (S.D.N.Y. January 10, 1996) (continuous sexual harassment included unwanted touching and threats by a knife-wielding defendant). The incidents in this case involve alleged conduct that is abusive in nature, and may be found by a jury to have created a hostile work environment, but are not drastic enough to support a cause of action for intentional infliction of emotional distress.

III. REMAINING ISSUES

A. Plaintiff Has Agreed to Withdraw His Retaliation Claim.

Plaintiff has agreed to withdraw his retaliation claim, and have his claims analyzed solely under the quid pro quo and hostile work environment frameworks. (Pl. Mem. at 18.)

B. Defendant Taylor Must Be Dismissed From The Federal Claims.

In the Second Circuit, Individual defendants are not liable for violations of Title VII. See Tomka, 66 F.3d at 1314. The federal claims against defendant Taylor are therefore dismissed.[2]

[2] The state sexual harassment claims may proceed against Taylor. See Tomka, 66 F.3d at 1317 (allowing a plaintiff to proceed against individual defendants under New York state sexual harassment law).

CONCLUSION

For the foregoing reasons, Defendant's motion for partial summary judgment pursuant to Federal Rule of Civil Procedure 56 is

(a) GRANTED with respect to defendants' liability for the state claim for intentional infliction of emotional distress under New York state law;

(b) GRANTED with respect to defendant Taylor's liability for the Title VII claim;

(c) DENIED with respect to plaintiff's federal and state sexual harassment claims against defendant Hyatt; and

(d) DENIED with respect to plaintiff's state sexual harassment claims against Taylor.

SO ORDERED.

ALLEN G. SCHWARTZ, U.S.D.J.

Dated: New York, New York
March __, 1999